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There's no Such Thing as a Free Trade (Agreement): The Environmental Costs of the Trans-Pacific Partnership

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The global community is quickly approaching the limits of the carbon budget meant to keep the effects of climate change below 2 degrees Celsius. Yet, the Countries involved in negotiating the Trans-Pacific Partnership only incrementally strengthened the environmental protections contained within the agreement compared to other recent Free Trade Agreements. As with most Free Trade Agreements, the environmental community fears that any beneficial effect from the Trans-Pacific Partnership's environmental provisions will be more than outweighed by its environmentally destructive consequences. The investor protection provisions are especially concerning to many environmental groups as these protections allow companies to sue governments to recoup losses resulting from certain regulations. Moreover, these suits are decided by non-governmental arbitration panels rather than by the court systems of member countries.

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* Paul Nuñez graduated Magna Cum Laude from the University of Miami School of Law in 2016. He currently works as an Assistant Public Defender with the Miami-Dade Public Defender's Office. Paul has long been interested in environmental causes, and completed his Bachelors of Science Degree in Environmental Studies at Florida International University. During law school Paul interned with several non-profit environmental law firms, working on issues such as the dredging of Biscayne Bay for the Port of Miami expansion, opposing fracking near the Florida Panther National Wildlife Refuge, and opposing a highway expansion project near the border of Everglades National Park. Paul would also like to thank Professor Felix Mormann for his feedback on drafts of this Note and his guidance throughout the writing process.

Negotiated at nearly the same time as a historic global climate change accord, and by an administration supportive of efforts to curb carbon dioxide emissions, does the Trans-Pacific Partnership materially improve upon the mistakes of earlier agreements, or does the agreement have the potential to exacerbate the disastrous consequences of climate change?

From November 30th to December 11th, 2015, the UN held the 21st Session of the Conference of the Parties to the United Nations Framework Convention on Climate Change ("COP 21").[1] The declared aim of COP 21 was for the global community to reach an accord that "will limit the rise in average global temperatures to 2 degrees Celsius, compared to the pre-industrial period, by the end of the century."[2] Failure to meet this goal will likely have disastrous results. "[L]ong-term sea level rise may exceed 1 meter"; "the risks

[1] UNFCCC COP 21, UNITED NATIONS, http://www.un.org/sustainabledevelopment/events/un-climate-change-conference/ (last visited Feb. 19, 2016).

[2] Laurent Fabius, *Our Climate Imperatives*, N.Y. TIMES (Apr. 24, 2015), http://www.nytimes.com/2015/04/25/opinion/laurent-fabius-our-climate-imperatives.html?_r=0.

of combined ocean warming and acidification would become high," and there could be mass coral bleaching.[3] "[C]rop production would be at high risk . . . ."[4] Furthermore, "[t]he risks will be increasingly unevenly distributed, and are generally greater for disadvantaged people and communities in countries at all levels of development . . . ."[5]

The effects of our warming climate can already be felt. Of the fifteen warmest years on record, fourteen have occurred since 2000.[6] 2014 was the second hottest year ever recorded before 2015 surpassed it by 0.23º F (0.13º C), the widest marginal temperature increase ever recorded, to become the new hottest year recorded.[7] Significant reduction in worldwide emissions of greenhouse gases is needed in order to meet the 2 °C global goal.[8] One hundred and seventy countries submitted their proposed climate action plans to the United Nations ahead of the COP 21 meeting.[9] An analysis of the plans submitted reveals that countries' submissions are projected to fall short of meeting the 2 °C global warming target.[10] Even if fully implemented, the proposed plans submitted ahead of COP 21 are

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[3] *Report on the structured expert dialogue on the 2013-2015 review,* UNITED NATIONS, 15 (May 4, 2015), http://unfccc.int/resource/docs/2015/sb/eng/inf01.pdf.

[4] *Id.*

[5] *Id.* at 16.

[6] Damian Carrington, *14 of the 15 hottest years on record have occurred since 2000, UN says*, THE GUARDIAN (Feb. 2, 2015), http://www.theguardian.com/environment/2015/feb/02/14-15-hottest-years-record-2000-un-global-warming.

[7] Release 16-008, *NASA, NOAA Analyses Reveal Record-Shattering Global Warm Temperatures in 2015*, NASA (Jan. 20, 2016), http://www.nasa.gov/press-release/nasa-noaa-analyses-reveal-record-shattering-global-warm-temperatures-in-2015.

[8] The Core Writing Team, Rajendra K. Pachauri et al., *Climate Change 2014 Synthesis Report* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, 10 (2014), http://ar5-syr.ipcc.ch/ipcc/ipcc/resources/pdf/IPCC_SynthesisReport.pdf.

[9] *What is the purpose of the national "contributions" (INDC)?*, UNITED NATIONS CONFERENCE ON CLIMATE CHANGE, http://www.cop21.gouv.fr/en/what-is-the-purpose-of-the-national-contributions-indc (last visited Feb. 19, 2016).

[10] *See Effect of current pledges and policies on global temperature*, CLIMATE ACTION TRACKER, http://climateactiontracker.org/global.html (last visited Feb. 19, 2016).

insufficient to keep warming below 2 °C, and if countries fail to adequately implement their climate change regulations, warming could be even more severe.[11]

One impediment to a stronger climate deal is the belief that greater environmental protection means slower economic growth.[12] The link between the economy and the environment is extremely complex. Economic growth often comes at the expense of environmental health,[13] but economic growth can also lead to greater demand for action to protect the environment.[14] Some have argued that faster economic growth is the key to ending the threat posed by climate change.[15] At least one study, however, has found both "evidence for the hypothesis that higher levels of economic growth are directly related to higher levels of supportiveness for environmental protection," and that publics of nations with high levels of national wealth appear to be less willing to pay for environmental protection than the publics of countries with low levels of national wealth.[16] The claim that "increases in societal wealth correlate with increases in the demand for environmental quality" is further complicated by the fact that economic growth in richer countries often correlates to

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[11] *Id.*

[12] Wynne Parry, *Economic Decline Not Enough to Reduce Planet-Warming Emissions*, LIVE SCIENCE (Oct. 7, 2012, 03:32 PM), http://www.livescience.com/23781-economic-decline-global-warming-emissions.html.

[13] *See* Jane A. Legget, *Congressional Research Service, "China's Greenhouse Gas Emissions And Mitigation Policies"* UNIVERSITY OF SOUTHERN CALIFORNIA (July 18, 2011), http://china.usc.edu/congressional-research-service-china's-greenhouse-gas-emissions-and-mitigation-policies-july-18-2011.

[14] *See* Jonathan H. Adler, *Conservative Principles for Environmental Reform*, 23 DUKE ENVTL. L. & POL'Y F. 253, 269 (2013), http://www.perc.org/sites/default/files/pdfs/Adler,%20Conservative%20Principles%20for%20Environmental%20Reform.pdf ("As a general rule, increases in societal wealth correlate with increases in the demand for environmental quality and in the means to protect environmental concerns.").

[15] *E.g.*, Ronald Bailey, *Fast Growth Can Solve Climate Change*, SCIENTIFIC AMERICAN, (Nov. 30, 2015), http://www.scientificamerican.com/article/fast-growth-can-solve-climate-change ("To truly address climate change, responsible policy makers should select courses of action that move humanity from slow- to high-growth trajectories, especially for the poorest developing countries.").

[16] *See* John Gelissen, *Explaining Popular Support for Environmental Protection A Multilevel Analysis of 50 Nations*, ENVIRONMENT AND BEHAVIOR, at 396 409-411 (May 2007), *available at* http://eab.sagepub.com/content/39/3/392.full.pdf+html.

environmental destruction in poorer ones.[17] Notwithstanding the complexities between climate change and the socioeconomic conditions affecting various sovereigns, one of the few clear connections between climate change and the economy is that climate change poses a monumental threat to global economic health.[18]

Trade constitutes a significant portion of the global economy; in recent decades, countries around the world have increasingly relied on trade agreements to facilitate trade between their nations.[19] While recent trade agreements entered into by the United States have included sections devoted to environmental issues, the effectiveness of those provisions have been questioned. Moreover, each of these free trade agreements ("FTAs") contain investor protection provisions which threaten to frustrate well-intentioned attempts by national governments to reduce their greenhouse gas emissions by blocking, or greatly increasing the cost of, effective enforcement of climate change regulations.

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[17] *See* R. Kerry Turner and Brendan Fisher, *Environmental Economics: To the Rich Man the Spoils*, 451 NATURE, at 1067-68 (Feb. 27, 2008), http://www.nature.com/nature/journal/v451/n7182/full/4511067a.html ("A significant proportion of the cost burden of the low-income group is caused by the activities of the other groups: looking at climate-change damage alone, rich countries might already have imposed costs on poor countries greater than the poor countries' existing foreign debt. The people bearing these costs include the one billion or so who already lack daily access to safe drinking water, electricity, secure food supplies and basic education.").

[18] *See* Mike Scott, *Climate Change Threatens Economic Growth - UN Report. How Should Investors React?*, FORBES (Apr. 3, 2014, 11:23 AM), http://www.forbes.com/sites/mikescott/2014/04/03/climate-change-threatens-economic-growth-un-report-how-should-investors-react/#169f67c33062 ("The latest report from the UN's Intergovernmental Panel on Climate Change (IPCC) could not be clearer – climate change is a threat to economic growth."); *see also* Larry Elliott, *Climate change disaster is biggest threat to global economy in 2016, say experts*, THE GUARDIAN (Jan. 14, 2016, 4:00 PM), http://www.theguardian.com/business/2016/jan/14/climate-change-disaster-is-biggest-threat-to-global-economy-in-2016-say-experts ("A catastrophe caused by climate change is seen as the biggest potential threat to the global economy in 2016, according to a survey of 750 experts conducted by the World Economic Forum.").

[19] *See* IMF Staff, *Global Trade Liberalization and the Developing Countries*, INTERNATIONAL MONETARY FUND (Nov. 2001), https://www.imf.org/external/np/exr/ib/2001/110801.htm.

This note will examine the interplay between Trans-Pacific Partnership's ("TPP's") environmental provisions and its investor provisions, and the potential environmental impacts of each, including the potential effects of TPP on international efforts to create a legal regime that responds to climate change.[20]

BACKGROUND

The TPP is the largest FTA in history,[21] so it is no surprise that the process of negotiating the agreement, as well as the agreement itself, have been heavily criticized and highly controversial. But, the TPP is far from the first FTA to receive criticism. Trade agreements and trade liberalization policies have a long history.[22] FTAs are efforts to increase trade by reducing tariffs and other trade barriers; they can take the form of bilateral or multilateral agreements.[23] TPP

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[20] The real-world effects of TPP on efforts to slow down and control climate change, including the GHG emissions associated with increased trade and with the outsourcing of industry to countries with lower environmental regulations and higher energy intensities, as well as whether or not such outsourcing and increased trade will actually result from TPP, are beyond the scope of this paper.

[21] Brock R. Williams, *Trans-Pacific Partnership (TPP) Countries: Comparative Trade and Economic Analysis,* CONG. RESEARCH SERV. , R 42344 (June 10, 2013), https://www.fas.org/sgp/crs/row/R42344.pdf; *TPP Full Text*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text [hereinafter *TPP*]; Jackie Calmes, *Trans-Pacific Partnership is Reached, but Faces Scrutiny in Congress*, N.Y. TIMES (Oct. 5, 2015), http://www.nytimes.com/2015/10/06/business/trans-pacific-partnership-trade-deal-is-reached.html?_r=0.

[22] *See* Kristi L. Bergemann, *A Digital Free Trade Zone and Necessarily-Regulated Self-Governance for Electronic Commerce: The World Trade Organization, International Law, and Classical Liberalism in Cyberspace*, 20 J. MARSHALL J. COMPUTER & INFO. L. 595, 615 (2002), http://repository.jmls.edu/cgi/viewcontent.cgi?article=1146&context=jitpl (stating that the roots of free trade go back to the mid-seventeenth century); *see also* Simon Lester, *The Limits of Multiculturalism: Incorporating (Some) Unilateral Free Trade Into the Trading System*, 53 VA. J. INT'L L. DIG. 9, 11-12 (Oct. 9, 2012), http://www.vjil.org/articles/the-limits-of-multilateralism-incorporating-some-unilateral-free-trade-into-the-trading-system (discussing England's repeal of the Corn Law tariffs in 1846, and the reactions of free trade proponents to the mid nineteenth century tariff reduction treaty discussions between England and France.).

[23] William H. Cooper, *Free Trade Agreements: Impact on U.S. Trade and Implications for U.S. Trade Policy*, CONG. RESEARCH SERV., RL 31356, at 2, 4 (Feb. 26, 2014), https://www.fas.org/sgp/crs/row/RL31356.pdf.

proponents tout that the agreement may reduce or eliminate almost 18,000 individual tariffs.[24]

Despite the recent successes FTA proponents have had in implementing new agreements, FTAs are often heavily criticized by a variety of domestic interest groups. The Dominican Republic-Central America Free Trade Agreement was "criticized as perpetuating a deeply flawed and inadequate labor situation."[25] The North American Free Trade Agreement[26] ("NAFTA") was criticized from "all areas of the political spectrum."[27] One recurring critique of FTAs is based on their environmental implications because FTAs can promote environmentally destructive activities through several mechanisms.

One of the most fundamental, adverse environmental effects of FTAs is the increased environmental destruction that accompanies the increased economic activity that FTAs are often projected to create.[28] Higher-volume cross-border trade results in greenhouse gas emissions ("GHG") both from the production of the traded goods and from the transportation of those goods between trading partners.[29] Lower tariffs can lead to higher production of certain goods, which proponents of FTAs often highlight. Trade liberalization can

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[24] Michael Froman, *The Trans-Pacific Partnership 18,000 Tax Cuts on Made-in-America Exports – A Guide to How Tax Cuts Will Benefit Exporting in Your State*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, https://ustr.gov/sites/default/files/TPP-Guide-to-18000-Tax-Cuts.pdf (last visited Sept. 2, 2016).

[25] Laura Glass-Hess, *Ready or Not, Here Comes DR-CAFTA: Comparing the Right of Association in Mexico, Guatemala, and El Salvador*, 35 GA. J. INT'L & COMP. L. 333, 335 (2007) (noting that DR-CAFTA passed Congress by an "extremely narrow margin.").

[26] North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, art. 1102, 32 I.L.M 289 (1993) [hereinafter NAFTA].

[27] Vanessa Humm, *American Trade News Highlights for Spring 2014 Promises Kept and Promises Broken-Nafta at Twenty*, 20 L. & BUS. REV. AM. 363, 364–65 (2014) ("Environmental and agricultural groups were split in their support and criticism for the agreement. Further, while most business groups supported NAFTA, it received opposition from 'labor, civil rights, human rights, certain business, and other groups.'").

[28] *See* Peter L. Lallas, *NAFTA and Evolving Approaches to Identify and Address "Indirect" Environmental Impacts of International Trade*, 5 GEO. INT'L ENVTL. L. REV. 519, 530-34 (1993).

[29] Anca Cristea, et al., *Trade and the Greenhouse Gas Emissions from International Freight Transport*, 65 J. ENVTL. ECON. & MGMT. 153, 154 (2013).

also lead a country to shift its trade to more distant partners, which leads to higher GHG emissions during transport.[30]

A more complex interaction between FTAs and environmental harm hinges on the former's potential for creating pollution havens,[31] a point on which NAFTA has been criticized.[32] Generally, the United States has stronger environmental laws than Mexico and is better at enforcing those laws.[33] At the time that NAFTA was being debated this disparity led to fears that U.S. companies that had previously passed on their environmental compliance cost to consumers would no longer remain competitive with factories in Mexico once tariffs on Mexican goods were eliminated.[34] It was feared that this would cause U.S. companies to relocate to Mexico, thereby avoiding stronger U.S. environmental laws, and increasing their overall pollution release.[35] As will be discussed further below, one very concerning aspect of NAFTA and other FTAs is the potential for investor protection provisions to be used to circumvent environmental laws.

In response to environmental and labor concerns, then presidential candidate, Bill Clinton, decided to only support NAFTA if its environmental and labor provisions were strengthened.[36] Ultimately, the NAFTA parties addressed environmental concerns in a

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30 *Id.*

31 Lallas, *supra* note 28, at 534–35.

32 *See* Carl F. Schwenker, *Protecting the Environment and U.S. Competitiveness in the Era of Free Trade: A Proposal*, 71 TEX. L. REV. 1355, 1372 (1993).

33 *Id.* at 1370.

34 *Id.*

35 *Id.* at 1372–74. Fortunately, several studies have found that the pollution haven effect never came to fruition. *See* John H. Knox, *The Neglected Lessons of the NAFTA Environmental Regime*, 45 WAKE FOREST L. REV. 391, 398 (2010) ("Studies, including those prepared under the auspices of the CEC itself, have consistently indicated that the fear of pollution havens is largely baseless. The marginal costs of abating pollution in developed countries, such as the United States, are simply not high enough to induce companies to move their operations abroad in search of lower costs in countries with lower environmental standards. As a result, whether the Pollution Haven Package is strong enough to avert an environmental race to the bottom is moot; no such race is occurring.").

36 David A. Gantz, *Labor Rights and Environmental Protection Under NAFTA and Other U.S. Free Trade Agreements*, 42 U. MIAMI INTER-AM. L. REV. 297, 309 (2011).

side agreement known as the North American Agreement on Environmental Cooperation ("NAAEC").[37] NAFTA is credited as one of the first FTAs to incorporate environmental provisions[38] and subsequent U.S. FTAs have followed NAFTA's example.[39]

NAFTA's environmental provisions, however, have been far from successful: "As an attempt to solve 'trade-and-environment' problems, [NAFTA] is undoubtedly a failure . . . .The regime has had its greatest success as a regional effort to promote sustainable development. It has contributed to stronger environmental protections, especially in Mexico."[40] Inclusion of anti-pollution haven language within NAFTA's environmental provisions appears to have been unnecessary.[41] While NAFTA's environmental provisions have in some instances contributed to stronger environmental protections, at other times NAFTA's investor provisions have frustrated attempts to implement environmental laws. Furthermore, despite its environmental provisions, NAFTA has been implicated in increased deforestation in Mexico as some Mexican farmers rushed to clear land to compete with the influx of cheap U.S. corn.[42]

Since the adoption of NAFTA, the threats posed by climate change have become more and more clear, and the environmental community has increasingly focused its attention on the potential for a warming climate to exacerbate almost all other environmental

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[37] Chris Wold, *Evaluating NAFTA and the Commission for Environmental Cooperation: Lessons for Integrating Trade and Environment in Free Trade Agreements*, 28 ST. LOUIS U. PUB. L. REV. 201, 203 (2008).

[38] David P. Vincent, *The Trans-Pacific Partnership: Environmental Savior or Regulatory Carte Blanche?*, 23 MINN. J. INT'L L. 1, 8 (2014).

[39] Daniel John Monahan, *Breaking NAFTA's Habits: The Pacific Rim Dispute and the Ongoing Challenge of Fostering Environmental Protection in the Age of Free Trade*, 41 GA. J. INT'L & COMP. L. 251, 263 (2012).

[40] *See* Knox, *supra* note 35, at 392 (2010).

[41] *See* Monahan, *supra* note 39.

[42] Gloria Soto, *Environmental Impact of Agricultural Trade Liberalization under NAFTA*, POLITICS & POLICY, 471, 483 (June 2012) ("The implication is that NAFTA's likely effect contributed 24 percent of the forest and jungle loss of this period. Other states that registered an important effect were San Luis Potosí, where direct conversion of forest and jungle areas to nonirrigated corn lands accounted to 89,092 hectares, which represented 37.3 percent of the forest and jungle loss for the whole period. The relative importance of deforestation due to greater small-scale corn agriculture was also significant in Tabasco (31.5 percent), Oaxaca (17.3 percent), and Campeche (10.4 percent). These figures reveal the impact of NAFTA in terms of deforestation and loss of carbon sinks in Mexico.").

problems. Thus, the potential for TPP to intensify climate change, or at least its failure to strongly combat climate change, has led to considerable opposition from environmental groups.[43] Not all environmental groups have come out in opposition to TPP, however.[44] This disagreement within the environmental community might be due to a split in thinking regarding whether the benefits of TPP's environmental provisions will outweigh the likely negative environmental impacts of TPP's investor protection provisions.

Like NAFTA, the Central America Free Trade Agreement-Dominican Republic ("CAFTA-DR"),[45] the United States-Peru Trade Promotion Agreement ("PTPA"),[46] the United States-Panama Trade Promotion Agreement ("Panama TPA"),[47] and the TPP all include investor protection provisions as well environmental provisions. FTA environmental provisions generally attempt to strengthen member countries' environmental enforcement – or at least to prevent countries from purposefully weakening environmental rules as a means to encourage investment. FTA investor provisions, on the other hand, can lead to liability on the part of a state for its enforcement of certain laws and regulations by empowering investors from one of the FTA countries to raise an investor-state dispute claim directly against the host country's government, and NAFTA greatly expanded the scope of such proceedings.[48] Depending on how

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[43] Ilana Solomon, *After Text Release, Environmental Groups Speak Out on Trans-Pacific Trade Deal*, SIERRA CLUB (Nov. 6, 2015), http://www.sierraclub.org/tpp-text-release-enviros.

[44] Letter from Mark R. Tercek, President & CEO, to President Barack Obama, THE NATURE CONSERVANCY (Oct. 05, 2015), *available at* https://www.whitehouse.gov/sites/default/files/docs/natureconservancytpp.pdf.

[45] Central America Free Trade Agreement-Dominican Republic, U.S.-Costa Rica-El Sal.-Guat.-Hond.-Nicar.-Dom.Rep., https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text [hereinafter CAFTA-DR].

[46] United States-Peru Trade Promotion Agreement, U.S.-Peru, Apr. 12, 2006, https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text [hereinafter PTPA].

[47] United States-Panama Trade Promotion Agreement, U.S.-Pan., June 28, 2007, https://ustr.gov/trade-agreements/free-trade-agreements/panama-tpa/final-text [hereinafter Panama TPA].

[48] *See* Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 44-45 (2003).

broadly TPP's investor protection provisions are interpreted, they can expose member countries to significant liability for otherwise legal regulatory efforts, including even those regulations that are specifically protected by TPP's environmental provisions. A particularly effective, or threatening, tool provided to investors by modern FTAs is the bar on measures "tantamount to nationalization or expropriation of . . . an investment . . . ."[49] Even if a state is not found liable, the threat of litigation, and the large potential damage awards it could bring, might chill attempts to effectively regulate environmentally destructive activities.[50]

Section I of this note will examine the TPP's environmental provisions. First, in Part. A, I will compare TPP's environmental provisions to those of earlier FTAs by analyzing changes to the binding, or non-binding, nature of certain parts as well as changes to the breadth of environmental issues covered by the provisions. Part B will analyze how TPP's treatment of multilateral environmental agreements differ from those of earlier agreements. Part C will then discuss how TPP's environmental provisions are to be enforced. Section II will focus on TPP's investor protection provisions. The analysis begins with Part A, which examines the evolving interpretation by arbitral panels of NAFTA's expropriation provision. Part B will explore the evolution of the expropriation standard from NAFTA to TPP by reviewing textual changes and arbitral decisions. Section III will then evaluate the potential conflict between TPP's environmental provisions and its investor provisions and illuminate some potential consequences of each chapter on international efforts to halt climate change.[51]

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[49] Vincent, *supra* note 38, at 11.

[50] *See Table of Foreign Investor-State Cases and Claims under NAFTA and Other U.S. "Trade" Deals*, PUBLIC CITIZEN, 11-16 (June 2015), http://www.citizen.org/documents/investor-state-chart.pdf ("The Ethyl arbitration was initiated after Canada banned the toxic substance MMT. Ethyl sought $250 million, alleging that the Canadian regulation indirectly expropriated its investment. Canada tried to dispose of the claim by arguing that Ethyl did not have standing to bring a claim under NAFTA, but Less than a month after losing the jurisdictional ruling, the Canadian government announced that it would settle with Ethyl. The terms of that settlement required the government to pay the firm $13 million in damages and legal fees, post advertising saying MMT was safe and reverse the ban on MMT.") [hereinafter PUBLIC CITIZEN]

[51] It is important to consider NAFTA and PTPA in this analysis, because TPP, once adopted, will supersede those agreements. CAFTA-DR and Panama TPA

ANALYSIS

Section I - Environmental Provisions

Proponents of TPP have forcefully argued that the agreement goes well beyond previous FTAs in expanding and enforcing environmental protection. The Office of the United States Trade Representative contends that "[i]n TPP, the United States has negotiated the most robust enforceable environment commitments of any trade agreement."[52] Writing for the White House Blog, Rohan Patel, Special Assistant to the President and Deputy Director of Intergovernmental Affairs, argues that "TPP will help shape an international response to the global environmental challenges we face on a bigger scale than ever before. TPP is packed with fully-enforceable, first-ever provisions that can affect real-world change and address environmental challenges and crises that threaten ecosystems, livelihoods, and economies alike."[53] Several environmental organizations have offered support, albeit cautious support, for the environmental provisions in TPP. The World Wildlife Fund issued the following statement:

> No major trade agreement before this one has gone so far to address growing pressures on natural resources like overexploited fish, wildlife, and forests . . . .With the right implementation and compliance procedures, the conservation commitments in

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are also helpful comparisons because CAFTA-DR was one of the earliest FTAs after NAFTA, and Panama TPA is one of the most recent FTAs. The investor protection provisions and environmental provisions in each of these FTAs share many similarities; however, each FTA differs in the extent to which it attempts to guide tribunals in determining whether an expropriation has occurred, as well as in the breadth and enforceability of its environmental provisions.

[52] *The Trans-Pacific Partnership: Preserving the Environment*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, https://ustr.gov/sites/default/files/TPP-Preserving-the-Environment-Fact-Sheet.pdf (last visited Feb. 19, 2016).

[53] Rohan Patel, *What Environmental and Conservation Advocates Are Saying About TPP's Environment Chapter*, THE WHITE HOUSE (Nov. 6, 2015, 12:09 PM), *available at* https://www.whitehouse.gov/blog/2015/11/04/what-environmental-and-conservation-advocates-are-saying-about-tpps-environment.

> this trade agreement could be game-changers. Of course there's more work to be done.[54]

Similarly, the Nature Conservancy, in a letter to President Obama, stated:

> We are strongly encouraged by the environmental provisions in the recently concluded Trans-Pacific Partnership (TPP) agreement and congratulate you and your administration on the successful negotiation of these provisions. By embedding conservation commitments in the core text of the agreement and making them subject to the TPP's dispute resolution mechanisms, the TPP provides new leverage to advance vital environmental objectives.[55]

Not all environmental groups agree with the assessments of the World Wildlife Fund and the Nature Conservancy. The Sierra Club has taken a starkly different view:

> After nearly six years of Trans-Pacific Partnership (TPP) negotiations conducted under extraordinary secrecy, the release of the final text reveals that the TPP environment chapter fails to protect our environment. The chapter excludes core environmental commitments that have been included in all U.S. trade agreements since 2007 and fails to meet the minimum degree of environmental protection required under the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 . . . .Even more, it falls far short of the meaningful protections called for by environmental groups including the Sierra Club . . . .Provisions in the text that have been

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[54] WWF Statement on the Close of the Trans-Pacific Partnership Negotiations, WORLD WILDLIFE FUND (Oct. 05, 2015), http://www.worldwildlife.org/press-releases/wwf-statement-on-the-close-of-the-trans-pacific-partnership-negotiations.

[55] Tercek, *supra* note 44.

> touted as new are generally hampered by weak language that would not adequately protect the environment.[56]

A. Breadth of Topics Covered, and their Binding, or Non-Binding Nature

Like all U.S. FTAs, many of the TPP's environmental provisions regarding a party's enforcement of its environmental laws are vague and aspirational. In language largely identical to that in CAFTA-DR, TPP provides that "[n]o Party shall fail to **effectively enforce** its environmental laws through a **sustained or recurring course of action or inaction** in a manner **affecting trade or investment** between the Parties."[57] Like previous agreements, TPP does not require that a party's environmental laws meet any specific standard, providing only that "[e]ach Party **shall strive** to ensure that its environmental laws and policies provide for, and encourage, **high levels** of environmental protection and to continue to improve its respective levels of environmental protection."[58] The non-binding nature of these sections is clarified by a subsequent section, which states the following:

> The Parties recognise that **each Party retains the right to exercise discretion** and to make decisions regarding: (a) investigatory, prosecutorial, regulatory, and compliance matters; and (b) the allocation of environmental enforcement resources with respect to other environmental laws determined to have higher priorities. Accordingly, the Parties understand that with respect to the enforcement of environmental laws, **a Party is in compliance with paragraph 4 if a course of action or inaction reflects a reasonable exercise of that discretion** . . . .[59]

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[56] *TPP Text Analysis: Environment Chapter Fails to Protect the Environment*, SIERRA CLUB 1, https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/tpp-analysis-updated.pdf (last visited Feb. 19, 2016).

[57] *TPP*, *supra* note 21, at art. 20.3(4) (emphasis added).

[58] *Id.* at art. 20.3(3) (emphasis added).

[59] *Id.* at art. 20.3(5) (emphasis added).

TPP, like recent FTAs such as Panama TPA, does contain some binding sections within its environmental provisions. For example, TPP states that "a Party **shall not** waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental laws in a manner that weakens or reduces the protection afforded in those laws in order to encourage trade."[60] Whereas, the comparable section of CAFTA-DR states that "each Party **shall strive** to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws . . . ."[61]

TPP also differs from earlier FTAs in that it contains a number of specific environmental provisions covering a broad spectrum of environmental issues. These include sections that focus specifically on ozone protection,[62] marine ship pollution,[63] trade and biodiversity,[64] invasive alien species,[65] fisheries,[66] as well as the transition to a low-emissions economy.[67] While many of these provisions are non-binding, a number of the provisions do contain binding components. It is far from clear, however, what overall effect these provisions will have.

Among the provisions in the environmental section with some binding effects are those dealing with fisheries and with ozone protection.[68] Much of section 20.16 of the TPP, Marine Capture Fisheries, is non-binding. For example, 20.16(3) merely provides that "each Party **shall seek** to operate a fisheries management system that regulates marine wild capture fishing and that is designed to: (a) prevent overfishing and overcapacity; (b) reduce bycatch . . . and (c)

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[60] *Compare id.* at art. 20.3(6) (emphasis added) *with* Panama TPA, *supra* note 39, at art. 17.3 2. ("The Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, neither Party shall waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws in a manner affecting trade or investment between the Parties.").

[61] CAFTA-DR, *supra* note 45, art. 17.2(2): Enforcement of Environmental Laws (emphasis added).

[62] *TPP*, *supra* note 21, at art. 20.5.

[63] *Id.* at art. 20.6.

[64] *Id.* at art. 20.13.

[65] *Id.* at art. 20.14.

[66] *Id.* at art. 20.16.

[67] *TPP*, *supra* note 21, at art. 20.15.

[68] *Id.* at art. 20.16, 20.5.

promote the recovery of overfished stocks . . . ."[69] Similarly, 20.16(4) provides only that:

> Each Party shall promote the long-term conservation of sharks, marine turtles, seabirds, and marine mammals, through the implementation and effective enforcement of conservation and management measures. Such measures should include, as appropriate: (a) for sharks: the collection of species specific data, fisheries bycatch mitigation measures, catch limits, and finning prohibitions; (b) for marine turtles, seabirds, and marine mammals: fisheries bycatch mitigation measures, conservation and relevant management measures, prohibitions, and other measures in accordance with relevant international agreements to which the Party is party.[70]

Section 20.16 does, however, contain one binding component. Section 20.16(5) provides that "no Party shall grant or maintain" specific fishing subsidies, including "subsidies for fishing that negatively affect fish stocks that are in an overfished condition . . . ."[71] Section 20.16(6) further provides that existing fishing subsidies "shall be brought into conformity with that paragraph as soon as possible and no later than three years of the date of entry into force of this Agreement . . . ."[72] Despite fisheries subsidies restrictions and provisions meant to protect sharks, it has been argued that the overall effect of TPP on sharks will be very destructive because of the following:

> Four of the five largest shark-fin importers in the world are TPP countries. That includes Vietnam, the world's 4th-largest importer of shark fins by volume, which currently imposes a 20-percent tariff on shark fins. TPP member Malaysia, meanwhile, is the world's 9th-largest importer of shark fins, with a 7-percent shark-fin tariff. These tariffs make imported

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69 *Id.* at art. 20.16(3)(a-c) (emphasis added).
70 *Id.* at art. 20.16(4)(a-b).
71 *Id.* at art. 20.16(5)(a).
72 *TPP*, *supra* note 21, at art. 20.16(6).

> shark fins more expensive, therefore restricting trade in shark fins and reducing the killing of sharks. On the very first day the TPP is implemented, however, these tariffs would be eliminated for shark fins imported from other TPP countries, such as Peru and Mexico – the 5th- and 7th-largest exporters of shark fins in the world, respectively.[73]

This argument has been extended to project a significant negative effect from TPP on certain rainforests and rainforest species, as well as on African elephants, because the TPP will reduce or eliminate tariffs on palm oil and legal ivory.[74]

Another binding section within the environmental provisions is section 20.5, which addresses ozone emissions.[75] This provision provides that "each Party shall take measures to control the production and consumption of, and trade in, such substances" and that "[a] Party shall be deemed in compliance with this provision if it maintains the measure or measures listed in Annex 20-A implementing its obligations under the Montreal Protocol or any subsequent measure or measures that provide an equivalent or higher level of environmental protection . . . ."[76]

B. TPP's Approach to Multilateral Environmental Agreements

While TPP's environmental provisions are roughly similar to those in CAFTA-DR, PTPA, and Panama TPA, some environmental groups have argued that TPP's environmental provisions are weaker than those of U.S. FTAs enacted after May 10, 2007, including Panama TPA. On May 10, 2007, the Bush Administration and the 110th Congress agreed to make the enforcement of several multilateral environmental agreements ("MEAs") a policy priority of pending

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[73] Ben Beachy, *Sharks, Tigers, and Elephants: New Analysis Reveals TPP Threats to Endangered Species*, SIERRA CLUB, at 2-3 (Dec. 7, 2015), http://www.sierraclub.org/compass/2015/12/sharks-tigers-and-elephants-new-analysis-reveals-tpp-threats-endangered-species.

[74] *Id*. at 3.

[75] *TPP*, *supra* note 21, at art. 20.5.

[76] *Id.* at art. 20.5(1) n. 4.

FTAs.[77] All U.S. FTAs entered into after May 10, 2007, have required parties to "**adopt, maintain, and implement** laws, regulations, and all other measures to fulfill its obligations under" seven different multilateral environmental agreements [MEAs].[78] The seven MEAs included are the following:

> (a) the Convention on International Trade in Endangered Species of Wild Fauna and Flora, done at Washington, March 3, 1973, as amended; (b) the Montreal Protocol on Substances that Deplete the Ozone Layer, done at Montreal, September 16, 1987, as adjusted and amended; (c) the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, done at London, February 17, 1978, as amended; (d) the Convention on Wetlands of International Importance Especially as Waterfowl Habitat, done at Ramsar, February 2, 1971, as amended; (e) the Convention on the Conservation of Antarctic Marine Living Resources, done at Canberra, May 20, 1980; (f) the International Convention for the Regulation of Whaling, done at Washington, December 2, 1946; and (g) the Convention for the Establishment of an Inter-American Tropical Tuna Commission, done at Washington, May 31, 1949.[79]

However, the "TPP only requires countries in the pact to 'adopt, maintain, and implement' domestic policies to fulfill one of the seven core MEAs . . . ."[80]

The TPP only explicitly uses the "adopt, maintain, and implement" language in reference to the Convention on International

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[77] *See* Cooper, *supra* note 23, at *5*; J. F. HORNBECK, *The U.S.-Panama Free Trade Agreement*, CONG. RESEARCH SERV., RL 32540, at 1 (2012), *available at* https://www.fas.org/sgp/crs/row/RL32540.pdf.

[78] *See e.g.*, Panama TPA, *supra* note 47, at art. 17.2 (Environmental Agreements) (emphasis added).

[79] Panama TPA, *supra* note 47, at Annex 17.2(a-g).

[80] SIERRA CLUB, *supra* note 56, at 2.

Trade in Endangered Species of Wild Fauna and Flora.[81] As discussed above, however, TPP also specifically references the Montreal Protocol, albeit not with the exact "adopt, maintain, and implement" language. Furthermore, though TPP does not enforce the remaining MEAs in the same manner as earlier U.S. FTAs, it appears that these MEAs have not been completely ignored. Whereas earlier U.S. FTAs such as PTPA and Panama TPA define "environmental law" to mean "any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment,"[82] the TPP defines "environmental law" to mean "a statute or regulation of a Party, or provision thereof, **including any that implements the Party's obligations under a multilateral environmental agreement**, the primary purpose of which is the protection of the environment . . . ."[83] Thus, Article 20.3(4), in stating that "no Party shall fail to effectively enforce its **environmental laws** through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties," is actually creating a binding enforcement provision for laws implementing seemingly any MEA.[84] Similarly, Article 20.7(5), which states that "[e]ach Party shall provide appropriate sanctions or remedies for violations of its **environmental laws** for the effective enforcement of those laws," also applies to laws implementing MEAs.[85] Article 20.3(6)[86] also applies to MEAs. Combined, TPP Articles 20.3(4) and 20.7(5) seem to require that a member Party's laws or regulations implementing an MEA be implemented, and Article 20.3(6) seems to require that such laws be maintained. Therefore, the actual difference between TPP's MEA enforcement measures, and those found in FTAs like Panama TPA, is that TPP does not provide that parties must "**adopt** . . . laws, regulations, and . . . other measures to fulfill [their] obligations under" MEAs.[87] TPP's MEA

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81 *Id.*; *TPP*, *supra* note 21, at art. 20.17(2).

82 Panama TPA, *supra* note 47, at art. 17.14(1).

83 *TPP*, *supra* note 21, at art. 20.1 (emphasis added).

84 *Id.* at art. 20.3(4) (emphasis added).

85 *Id.* at art. 20.7(5) (emphasis added).

86 "[A] Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its **environmental laws** in a manner that weakens or reduces the protection afforded in those laws in order to encourage trade or investment between the Parties . . . ." *Id.*, at art. 20.3(6).

87 Panama TPA, *supra* note 47, at art. 17.2 (emphasis added).

provision has also been weakened because application of Articles 20.3(4) and 20.3(6) are limited to instances in which the action in question affects trade or investment between the parties.[88] Whether this distinction renders TPP's MEA provisions toothless is unclear at this point. It is possible, however, that by incorporating seemingly any MEA rather than the seven included in earlier agreements, the TPP actually provides for broader enforcement of MEAs than do earlier FTAs.

C. Enforcement of TPP's Environmental Provisions

TPP provides two mechanisms for enforcing the provisions of the environmental section. One is Article 20.9 (Public Submissions), which specifies that "[e]ach Party shall provide for the receipt and consideration of written submissions from persons of that Party regarding its implementation of this Chapter."[89] The other enforcement mechanism is Chapter 28 (Dispute Resolution), which applies "wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement or that another Party has otherwise failed to carry out its obligations under this Agreement."[90] Importantly, neither enforcement option is as powerful as the investor-state arbitration system provided for private investors under Chapter 9 (Investment), because they provide "neither an international standard for environmental protection, nor a dispute resolution process by which private parties seeking to enjoin or punish environmental malfeasance may sue for an order stating such events have occurred."[91]

The Public Submissions section provides only that:

> If a submission asserts that a Party is failing to effectively enforce its environmental laws and following the written response to the submission by that Party, any other Party may request that the Committee on Environment (Committee) discuss that submission

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88 *TPP*, *supra* note 21, at art. 20.3(4) and 20.3(6).

89 *Id.* at art. 20.9(1).

90 *Id.* at art. 20.2(b).

91 Bradley N. Lewis, *Biting Without Teeth: The Citizen Submission Process and Environmental Protection*, 155 U. PA. L. REV. 1229, 1241 (2007). Although this article was discussing NAFTA and CAFTA-DR, the environmental provision enforcement mechanisms in those agreements are very similar to those in TPP.

> and written response with a view to further understanding the matter raised in the submission and, as appropriate, to consider whether the matter could benefit from cooperative activities[92]

This process does not result in any "legally binding effect on the Parties."[93] Moreover, TPP's environmental provisions lack a feature that even NAFTA included; public submissions leading to a factual record. This is very concerning because "[i]n other U.S. FTAs offering a public submission process, including the North American Agreement on Environmental Cooperation (NAAEC), CAFTA-DR, the PTPA, the U.S.-Colombia Trade Promotion Agreement, and the U.S.-Panama Trade Promotion Agreement, the final factual record is what drives the public to utilize this enforcement mechanism."[94]

Under Chapter 28 (Dispute Resolution), if consultation between the parties does not resolve the dispute, a panel may be formed to determine whether the measures taken by the responding party are "inconsistent with [its] obligations under [the] Agreement," or whether the responding party has "failed to carry out its obligations under [the] Agreement . . . ."[95] If the panel finds that such a violation of TPP has occurred, the complaining party may be entitled to suspend the responding party's benefits or compensation.[96] While party dispute resolution is a potentially powerful tool for enforcing the provisions of the environment chapter, "no Party has ever brought a formal case based on the environmental provisions of *any* U.S. FTA—despite documented violations."[97]

In sum, as with earlier FTAs, the environmental provisions in TPP are largely non-binding. TPP does contain some binding provisions, including in sections dealing with specific environmental concerns that were not explicitly addressed in earlier FTAs. While

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92 *TPP*, *supra* note 21, at art. 20.9(4).

93 *The Trans-Pacific Partnership and the Environment: An Assessment of Commitments and Trade Agreement Enforcement*, CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW 7, http://www.ciel.org/wp-content/uploads/2015/11/TPP-Enforcement-Analysis-Nov2015.pdf [hereinafter CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW].

94 *Id.* at 5.

95 *TPP*, *supra* note 21, at 28.17(4)(b).

96 *See id.* at art. 28.20.

97 CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 93, at 1.

TPP's MEA provisions diverge significantly from the approach taken by earlier FTAs, the end result may be that TPP incorporates a greater number of MEAs than earlier agreements did, but the enforcements of covered MEAs may have been more thorough in earlier agreements. Finally, TPP incorporates enforcement mechanisms for its environmental provisions similar to those in earlier FTAs; however, the failure in TPP to include a public submissions process that leads to a factual record is a significant step backward.

Section II - Investor Protection

NAFTA was one of the first FTAs to create a mechanism for investors to bring their disputes directly against member states, but this is now standard practice.[98] In contrast to the enforcement mechanisms available for FTA environmental provisions, the enforcement mechanisms for investor provisions have been widely used and rather successful at protecting the interests of the beneficiaries of the investment chapter. NAFTA, CAFTA-DR, PTPA, Panama TPA, and TPP all provide essentially equivalent categories of investor protection and all allow for investor state dispute settlement as a means of enforcing those protections. These categories are called national treatment, most-favored-nation treatment, minimum standard of treatment, and expropriation and compensation. In NAFTA, these standards provide that each nation party to the agreement "shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors . . . " (national treatment);[99] that "[e]ach Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party . . . " (most-favored-nation treatment);[100] that "[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment . . . " (minimum standard of treatment);[101] and, that "[n]o Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a

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98 Monahan, *supra* note 39, at 261.
99 NAFTA, *supra* note 26, at art. 1102.
100 *Id.* at art. 1103.
101 *Id.* at art. 1105.

measure tantamount to nationalization or expropriation . . . " (expropriation and compensation).[102] Of these investor protection categories, protection against expropriation has been subject to the most revision between FTAs.[103] For the most part, however, the investor protections offered by FTAs since, and including, NAFTA have remained constant. Furthermore, where the language of the agreements may have differed, arbitral tribunals have often provided interpretations that bring the provisions into greater conformity.

A. Arbitral Interpretations of NAFTA's Expropriation Provision

NAFTA's expropriation and compensation section provides that:

> No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation . . . .[104]

Several aspects of this provision render it vague. First, while it would clearly violate this NAFTA provision's bar against direct expropriations if a party were to nationalize a privately owned company belonging to an investor of another party, it is less clear when exactly an indirect expropriation has occurred. Though the concept of "indirect" expropriations has been described as analogous to

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[102] *Id.* at art. 1110.

[103] Between NAFTA and CAFTA-DR the expropriation section gained an annex in order to guide arbitral tribunals' interpretations. While the minimum standard of treatment section also gained an annex in CAFTA-DR, that addition was far simpler than the expropriation annex. *See also* Meredith Wilensky, *Reconciling International Investment Law and Climate Change Policy: Potential Liability for Climate Measures Under the Trans-Pacific Partnership*, 45 ENVTL. L. REP. NEWS & ANALYSIS 10683, 10693 (2015) ("Tribunals initiated under existing IIAs have taken a more consistent approach toward national treatment and MFN obligations than they have toward indirect expropriation and FET obligations.").

[104] NAFTA, *supra* note 26, at art. 1110.

"regulatory takings" in U.S. takings jurisprudence,[105] its inclusion in NAFTA's expropriation provision has been a cause for concern. This is because "[d]espite claims that NAFTA simply 'exports' the U.S. takings standard, the tribunals' interpretations of the expropriation provision have exceeded the substantive scope of U.S. compensation requirements, while removing procedural limitations typically imposed on domestic takings claims."[106]

Second, what constitutes a measure "tantamount" to expropriation? How, if at all, does a measure "tantamount" to expropriation differ from an expropriation? The "tantamount" language has repeatedly been used to argue for a broader "scope of what could be considered an indirect expropriation"; leaving the question to "individual tribunals to determine otherwise."[107] This creates a "looming possibility of a broad application of the expropriation provision under Article 1110."[108] Such a possibility raises concerns about the future ability of governments to legislate and regulate . . . ."[109] These questions have caused uncertainty for regulators and investors, and have been a source of fear among environmentalists opposed to FTAs.

In order to understand why some environmentalists feel that NAFTA's expropriation provision is so dangerous, it is necessary to first consider several NAFTA arbitral decisions. Here, a distinction must be made between actions that various claimants have alleged constitute expropriation and what tribunals have actually held to constitute an expropriation. Expropriation claims are commonly brought, but are very rarely successful. Claims that a government has violated one of the other investor protections are successful much more often than expropriation claims. Overall, investors have had some degree of success challenging the actions of governments

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[105] Michael Muse-Fisher, *CAFTA-DR and the Iterative Process of Bilateral Investment Treaty Making: Towards A United States Takings Framework for Analyzing International Expropriation Claims*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 495, 526 (2007) ("Even before CAFTA-DR's inception, the similarities between international indirect expropriation law and U.S. regulatory takings jurisprudence had already been recognized by many legal scholars.").

[106] Been & Beauvais, *supra* note 48, at 30.

[107] Muse-Fisher, *supra* note 105, at 506.

[108] Michael G. Parisi, *Moving Toward Transparency? An Examination of Regulatory Takings in International Law*, 19 EMORY INT'L L. REV. 383, 404 (2005).

[109] *Id.*

under FTAs. A June 2015 analysis by the nonprofit group, Public Citizen, found that a total of 88 claims had been filed by investors under NAFTA-style deals (a broader category than the FTAs considered in this Note); of those 88 cases, 22 were dismissed (a win for the government), and investors won 15 cases.[110] The analysis concluded that those 15 cases resulted in governments paying $444.1 million to foreign investors.[111]

Nevertheless, environmentalists can find plenty of reasons to fret over certain arbitral decisions even though those claimants ultimately failed on the merits of their expropriation claim. Several arbitral decisions show that tribunals are open to rather broad interpretations of expropriation, even if no expropriation was found in that specific arbitration. The case that originally confirmed the environmental community's worst fears was *Metalclad Corp. v. United Mexican States*.[112] This case stemmed from Metalclad's decision to purchase a Mexican corporation named COTERIN, which had been granted certain state and federal permits for the construc-

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[110] *Table of Foreign Investor-State Cases and Claims under NAFTA and Other U.S. "Trade" Deals*, PUBLIC CITIZEN 40 (June 2015), http://www.citizen.org/documents/investor-state-chart.pdf.

[111] *Id.*

[112] Vincent, *supra* note 38, at 15 ("The outcomes of Metalclad and Ethyl Corp. gave environmentalists serious concerns about the increasing scope of investor-state claims"); Katie Zaunbrecher, *Pac Rim Cayman v. Republic of El Salvador: Confronting Free Trade's Chilling Effect on Environmental Progress in Latin America*, 33 HOUS. J. INT'L L. 489, 491 (2011) ("During the expedited CAFTA-DR negotiations, environmentalists and legal scholars heatedly discussed whether the Central American agreement could or should improve upon NAFTA's weak environmental protections, particularly the Chapter 11 investor-state dispute resolution mechanism that had allowed Metalclad's judgment against Mexico."); Joshua Elcombe, *Regulatory Powers v. Investment Protection Under NAFTA's Chapter 1110:Metalclad, Methanex, and Glamis Gold*, 68 U.T. FAC. L. REV. 71, 79 (2010) ("Critics cite Metalclad as proof that Chapter 11 could impose significant constraints on the NAFTA states' ability to protect the environment, labour standards, and their populations' health.").

tion and operation of a transfer station for hazardous waste, in September of 1993.[113] In 1991, COTERIN had been denied a local construction permit for the hazardous waste disposal site project.[114] Metalclad claimed that it would not have purchased COTERIN "but for the apparent approval and support of the project by federal and state officials."[115] Metalclad began construction of the hazardous waste dump in May of 1994; five months later the local government ordered that construction be stopped because Metalclad lacked a municipal construction permit.[116] Shortly thereafter, Metalclad simultaneously resumed construction and applied for a municipal construction permit.[117] In December of 1995, thirteen months after Metalclad's application had been submitted, the municipal construction permit was denied; however, Metalclad had already completed construction nine months earlier.[118] The municipality then initiated court proceedings, which resulted in an injunction barring the operation of the hazardous waste facility.[119] In January of 1997, Metalclad initiated arbitral proceedings under NAFTA.[120] Several months later, the governor of the state issued a decree declaring the area encompassing Metalclad's hazardous waste site "a Natural Area for the protection of rare cactus."[121]

Metalclad maintained that it had been informed by federal officials that it had all the authority necessary to construct and operate the landfill; that federal officials said it should apply for the municipal construction permit to facilitate an amicable relationship with

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113 Metalclad Corp. v. Mexico, Award, ICSID Case No. ARB(AF)/97/1, para. 28-35 (Aug. 30, 2000), available at http://www.italaw.com/sites/default/files/case-documents/ita0510.pdf [*hereinafter* Metalclad Award].

114 Metalclad Corp. v. United Mexican States, Counter-Memorial, ICSID Case No. ARB(AF)/97/1 (Feb. 17, 1998), available at http://naftaclaims.com/disputes/mexico/Metalclad/MetalCladMexicoCounterMemorial.pdf, para. 50; *see also* Metaclad Award, *supra* 113, at para. 44.

115 Metalclad Award, *supra* note 113, at para. 36.

116 *See id.* at para. 38-40.

117 *Id.* at para. 42.

118 *Id.* at para. 50.

119 *Id.* at para. 56.

120 Metalclad Award, *supra* note 113, at para. 58.

121 *Id.* at para. 59.

the Municipality; that federal officials assured it that the Municipality would issue the permit as a matter of course; and that the Municipality lacked any basis for denying the construction permit[122]

Metalclad also asserted that "there was no evidence that the Municipality ever required or issued a municipal construction permit for any other construction project . . . ."[123] Mexico denied that any federal officials assured the company that no municipal permit was required,[124] asserting that "Metalclad was aware through due diligence that a municipal permit might be necessary on the basis of the case of COTERIN . . . ."[125]

The tribunal found that "Metalclad was entitled to rely on the representations of federal officials and to believe that it was entitled to continue its construction of the landfill."[126] The tribunal further found that even if a municipal construction permit had been required, "the federal authority's jurisdiction was controlling and the authority of the municipality only extended to appropriate construction considerations," and not to environmental considerations.[127] The tribunal held that an expropriation under NAFTA includes not only open, deliberate, and acknowledged takings of property, such as outright seizure, or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.[128]

The municipality acted outside of its authority in denying the construction permit based in part on its "perception of the adverse environmental effects of the hazardous waste landfill and the geological unsuitability of the landfill site."[129] This action, in conjunction with Metalclad's reasonable reliance on the representations of the federal officials, and the unlawful prevention of Metalclad's op-

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122 *Id.* at para. 41.
123 *Id.* at para. 52.
124 *Id.* at para. 41.
125 Metalclad Award, *supra* note 113, at para. 53.
126 *Id.* at para. 89.
127 *Id.* at para. 86.
128 *Id.* at para. 103.
129 *Id.* at para. 106.

eration of the hazardous waste landfill, amounted to an indirect expropriation.[130] The tribunal separately found that the ecological decree issued by the governor constituted an expropriation because it "barr[ed] forever the operation of the landfill."[131]

Several years after the Metalclad decision, a tribunal's decision in *Methanex v. United States* eased the concerns of many environmentalists.[132] Methanex initiated its NAFTA claim after the governor of California signed an Executive Order phasing out the use of a chemical known as MTBE in gasoline.[133] MTBE was a gasoline additive meant to reduce auto emissions, but several studies indicated that the compound might pose a health risk.[134] The tribunal found that no expropriation had occurred and further held:

> [A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment, is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.[135]

Methanex "did not enter the United States market because of special representations made to it"; furthermore, Methanex was aware that it had entered a highly regulated industry.[136] "[T]he California ban was made for a public purpose, was non-discriminatory,

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130 Metalclad Award, *supra* note 113, at para. 106-107.

131 *Id.* at para. 109.

132 Jordan C. Kahn, *Striking Nafta Gold: Glamis Advances Investor-State Arbitration*, 33 FORDHAM INT'L L.J. 101, 112 (2009) ("Five years after Metalclad, Methanex eased environmentalists' fears."); Vincent, *supra* note 38, at 114 ("The outcomes of Metalclad and Ethyl Corp. gave environmentalists serious concerns about the increasing scope of investor-state claims, but in 1995, Methanex v. California helped relieve some of the worry.").

133 Vincent, *supra* note 38, at 116.

134 *Id.*

135 Methanex Corp. v. United States, Final Award of the Tribunal on Jurisdiction and Merits, 44 I.L.M. 1345, pt. IV ch. D p.4 (2005), *available at* http://www.italaw.com/sites/default/files/case-documents/ita0529.pdf [hereinafter Methanex Final Award].

136 *Id.* at p.5.

and was accomplished with due process. Hence, Methanex's central claim under Article 1110(1) of expropriation under one of the three forms of action in that provision fails."[137]

Many of those upset by the Metalclad decision applauded the Methanex tribunal's approach, believing that Methanex had repudiated the earlier case.[138] While the Methanex tribunal interpreted the expropriation clause much more narrowly than the Metalclad tribunal, the Methanex "holding" does not bind any other NAFTA tribunal.[139] Furthermore, while the decision is a good one from a policy standpoint, certain aspects of the tribunal's reasoning seem to be rather weak upon a close reading of the text of NAFTA's expropriation and compensation section. The Methanex tribunal held that because the ban was (1) made for a public purpose, (2) non-discriminatory, and (3) done with due process, it did not constitute an expropriation. However, NAFTA's expropriation section specifically states that a Party may not "expropriate an investment . . . **except** (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation . . . ."[140] Thus, the clause clearly envisions that a non-discriminatory measure, done for a public purpose, and in accordance with due process, may constitute an expropriation. In fact, this is the only type of expropriation sanctioned by NAFTA, as long as compensation is paid.[141]

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[137] *Id.* at p.10.

[138] Elcombe, *supra* note 112, at 83 ("In its decision, the [Methanex] Tribunal arguably rejected the Metalclad approach . . . ."); Anatole Boute, *The Potential Contribution of International Investment Protection Law to Combat Climate Change*, 27 J. ENERGY & NAT. RESOURCES L. 333, 368 (2009) ("Finally, in the famous Methanex case, the arbitral tribunal confirmed this interpretation and thus rejected definitively the approach of the Metalclad tribunal.").

[139] NAFTA, *supra* note 26, at art. 1136(1).

[140] *Id.* at art. 1110 (emphasis added).

[141] Elcombe, *supra* note 112, at 85 ("According to the text of Article 1110(1), expropriatory measures which do not conform to 1110(1)(a), (b), (c), and (d) are flatly unpermitted and should be removed. Compensable expropriations are permitted, but they must meet the four requirements set out in 1110(1). Following the Methanex Tribunal's approach to expropriation, though, by fulfilling 1110(1)(a), (b), and (c), compensable expropriations are not actually expropriations in the first place, and hence Article 1110(1) does not apply. The compensation requirement in 1110(1)(d) could never have any effect.").

In upholding the MTBE regulation as a non-expropriatory measure, the tribunal seemed most focused on "the fact that the investor should have expected such measures and that no contrary assurances were given by the host state."[142] In this sense, Methanex can actually be reconciled with Metalclad in that the Metalclad tribunal focused heavily on the assurances given to Metalclad by federal authorities, that all required permits had been acquired, and the reasonableness of Metalclad's reliance on those assurances.[143] Thus, the requirement that the investor's investment be induced by government insurances will likely be the aspect of the Methanex decision to prove most durable.

This is evidenced by NAFTA cases decided subsequent to Methanex. Though, like Methanex, these cases have "express[ed] a certain willingness to bring customary international law approaches to expropriation into Article 1110," for the most part, whether or not an expropriation has occurred has been determined based not on the character and purpose of the regulation, but instead "based on the quantum of damage to the investment."[144]

Another concerning aspect of NAFTA's expropriation and compensation section is the broad definition of property contained in the agreement and the even broader interpretation given to it by arbitral tribunals. In *S.D. Myers, Inc. v. Canada*, S.D. Myers, a U.S. company, challenged a temporary ban on the export of polychlorinated biphenyls ("PCB").[145] S.D. Myers owned a PCB remediation facility located around one hundred kilometers south of the U.S.–Canada border and hoped to offer its remediation services to clients within Canada.[146] After Canada implemented the temporary ban, S.D. Myers alleged that Canada had committed several NAFTA violations because the ban on exporting PCBs resulted in "harm to its invest-

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142 *Id.* at 84.

143 *Id.* ("it is not entirely clear that Methanex reversed Metalclad."); Metalclad Award, *supra* note 113, at para. 89 ("Metalclad was entitled to rely on the representations of federal officials and to believe that it was entitled to continue its construction of the landfill.").

144 Elcombe, *supra* note 112, at 87.

145 Been & Beauvais, *supra* note 48, at 66.

146 Rachel D. Edsall, *Indirect Expropriation Under NAFTA and DR-CAFTA: Potential Inconsistencies in the Treatment of State Public Welfare Regulations*, 86 B.U. L. Rev. 931, 944 (2006).

ment through interference with its operations, lost contracts and opportunities in Canada."[147] In a similar case, *Pope & Talbot v. Canada*, a U.S. company operating in British Columbia challenged export limitations on softwood lumber.[148] Pope & Talbot alleged that an expropriation had occurred because the actions taken by Canada had "'deprived the Investment of its ordinary ability to alienate its product to its traditional and natural market.'"[149] "The tribunal concluded that Pope & Talbot's access to the U.S. market constituted a 'property interest subject to protection under Article 1110.'"[150] The claim was unsuccessful only because the "regulatory measures implemented did not 'constitute an interference with the Investment's business activities substantial enough to be characterized as an expropriation under international law.'"[151]

While ultimately unsuccessful, these cases indicate that under NAFTA, expropriation claims are given more leeway than takings claim under U.S. law, because denial of access to a certain market, or even a market share, is sufficient to form the basis of a claim.[152]

> Although neither the Pope & Talbot nor the S.D. Myers tribunals found that the claimant's property had been taken, both tribunals considered the opportunity to sell one's products in a particular market to be a property interest that could trigger the compensation requirement. Both awards, therefore, are inconsistent

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147 S.D. Myers, Inc. v. Canada, First Partial Award, (NAFTA Trib. 2000), 40 I.L.M. 1408 (2001) para. 290, available at http://www.italaw.com/sites/default/files/case-documents/ita0747.pdf.

148 Been & Beauvais, *supra* note 48, at 65.

149 Edsall, *supra* note 146, at 943.

150 *Id.*

151 *Id.*

152 *See* Terra Lawson-Remer, *Values Under Siege: NAFTA, GATS, and the Propertization of Resources*, 14 N.Y.U. ENVTL. L.J. 481, 510 (2006) ("The tribunals in both Pope & Talbot and S.D. Myers asserted that market access is included in the bundle of rights that constitute ownership and is thus a protected property interest."); Frank E. Loy, *On A Collision Course? -- Two Potential Environmental Conflicts Between the U.S. and Canada*, 28 Can.-U.S. L.J. 11, 23 (2002) ("The expropriation problem is compounded by the tribunals' interpretations of certain terms in Chapter 11. In S.D. Myers, the Tribunal included as an "investment" assets such as the market share a company had achieved even though it owned no physical plant in the country.").

> with U.S. takings jurisprudence and threaten to expand the reach of regulatory takings principles to a wide range of investor interests not protected under domestic law.[153]

In the similarly situated case of *Glamis Gold, Ltd. v. United States*, Glamis Gold, a Canadian company, asserted that its investment had been expropriated by a series of actions taken by both the U.S. government and California.[154] Several measures taken by both California and the U.S. had delayed the Glamis Gold project and increased its cost.[155] Among those measures was one requiring "the complete backfilling and re-contouring of all surface hardrock mining operations"; specifically, "mining operation[s] . . . within one mile of any Native American sacred site . . . ."[156] Glamis alleged that the laws and regulations implemented by California "rendered the project economically infeasible."[157]

Glamis alleged that prior to the imposition of these requirements the value of its project was $49.1 million and that after the adoption of the measures the value shrunk to negative $8.9 million.[158] In response, the U.S. maintained "owners of mineral rights do not have recognized property interests in the ability to mine free from compliance with subsequently enacted environmental regulation."[159] Though the limitation on the property interests of mineral rights owners would likely have precluded consideration of a takings claim under U.S. law,[160] the tribunal did not address the issue, instead disposing of the expropriation claim on the grounds that Glamis did not suffer a large enough financial injury; in the tribunal's analysis, the Project was still worth $20 million after taking into consideration the costs of the backfilling measure.[161]

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153 Been & Beauvais, *supra* note 48, at 67.

154 *See generally* Glamis Gold Ltd. v. United States, Award (NAFTA Arb. Trib. 2009), http://www.state.gov/documents/organization/125798.pdf [hereinafter Glamis Award].

155 *Id.* at para. 11.

156 *Id.* at para. 172.

157 *Id.* at para. 11.

158 *Id.* at para. 362.

159 Kahn, *supra* note 132, at 125.

160 *Id.*

161 Glamis Award, *supra* note 154, at para. 535-36.

B. Post-NAFTA Evolution of FTA Expropriation Provisions

CAFTA-DR departs from the approach taken with NAFTA's expropriation and compensation section by providing significantly more guidance on interpreting the provision than NAFTA does. CAFTA-DR's anti-expropriation provision provides that:

> No Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation in accordance with paragraphs 2 through 4; and (d) in accordance with due process of law and Article 10.5.[162]

While essentially replicating NAFTA's anti-expropriation provision verbatim, albeit with a slightly altered word order, CAFTA-DR adds Annex 10-C to guide tribunals interpreting the provision.[163] Additionally, CAFTA-DR's expropriation and compensation section deviates from NAFTA's by replacing the phrase "a measure **tantamount** to nationalization or expropriation"[164] with the phrase "measures **equivalent** to expropriation or nationalization."[165] This change might appear insignificant, however, "many claims filed under NAFTA's Chapter 11 argued that 'tantamount' was intended to broaden the scope of what could be considered an indirect expropriation, and it was left up to the individual tribunals to determine otherwise."[166] Thus, replacing "tantamount" with "equivalent" serves to remove the discretion of a tribunal to apply a more expansive definition of "indirect expropriation."

Annex 10-C, while far from a step-by-step guide, serves to remove some discretion from arbitral tribunals, which under NAFTA were free to interpret expropriation extremely broadly.[167] In part,

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[162] CAFTA-DR, *supra* note 45, at art. 10.7(1).

[163] *See generally id*, at Annex 10-C (Expropriation).

[164] NAFTA, *supra* note 26, at art. 1110(1).

[165] CAFTA-DR, *supra* note 45, at art. 10.7 (emphasis added).

[166] Muse-Fisher, *supra* note 105, at 506.

[167] *Id.* at 508 ("The CAFTA-DR removes some of the ambiguity that surrounds NAFTA's Chapter 11 by placing a ceiling on what may be considered an

CAFTA-DR accomplishes this by essentially codifying aspects of the Methanex decision. Whereas the Methanex tribunal's analysis, seemingly in contravention of NAFTA's text, stated that an action taken for a public purpose, in a non-discriminatory, and done with due process was not an expropriation, Annex 10-C's text explicitly provides that "[e]xcept in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations."[168] CAFTA-DR further mirrors Methanex by expressly providing that the expropriation provision is "intended to reflect customary international law concerning the obligation of States with respect to expropriation."[169] Furthermore, CAFTA-DR provides that "actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment."[170]

Taken together, these changes reflect a serious effort to reduce the likelihood that investors will be compensated for having to comply with government regulations:

> CAFTA-DR heavily improved upon its predecessor NAFTA by limiting the types of investor-state claims. While CAFTA-DR's Chapter 10 on Investment is nearly identical to NAFTA's Chapter 11, it includes a significant addition in its Annex. Annex 10-C addresses expropriation by further defining and narrowing an investor's ability to recover due to indirect expropriation.[171]

It is not clear how effective these changes have been in preventing investors from initiating claims in response to public interest regulation. Some commentators argue that "[t]hus far, redefining expropriation has had a seemingly positive effect on curbing state-in-

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indirect expropriation, thereby contributing to the predictability of CAFTA-DR for future investors.").

168 CAFTA-DR, *supra* note 45, at Annex 10-C(4)(b).

169 *Id.* at 10-C(1).

170 *Id.* at 10-C(2).

171 Vincent, *supra* note 38, at 121.

vestor disputes over environmental public welfare objectives," citing as an example *Pac Rim Cayman LLC v. Republic of El Salvador*, where "the claim was ultimately dismissed under the expropriation clause in Article 10.7."[172] In Pac Rim, however, the CAFTA-DR claims, including Pac Rim's expropriation claim, were not decided on the merits because the tribunal found that it lacked jurisdiction to hear those claims under Article 10.12 (Denial of Benefits), which states that:

> A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of any Party, other than the denying Party, and persons of a non-Party, or of the denying Party, own or control the enterprise.[173]

Since its 2004 implementation, nine investor claims have been filed under CAFTA-DR;[174] seven of which have alleged expropriations.[175] Peru FTA and Chile FTA include expropriation provisions that are essentially identical to CAFTA-DR's expropriation provision. To date, two cases have been filed under Peru FTA, one of which alleges that an expropriation occurred as a result of government environmental regulation, and one such case has been filed under Chile FTA. While the twelve cases filed under CAFTA-DR, Peru FTA, and Chile FTA are significantly smaller than the total number of cases filed under NAFTA, NAFTA constitutes a significantly larger portion of global trade than these other agreements and has existed longer than these other agreements. Therefore, it is difficult to tell if the weaker expropriation provisions in these agreements have effectively reduced the rate or success of investor claims against governmental regulation.

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[172] *Id.* at 122.

[173] CAFTA-DR, *supra* note 45, at art. 10.12(2); Pac Rim Cayman, LLC v. El Salvador, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, http://www.italaw.com/sites/default/files/case-documents/ita0935.pdf, P 4.92.

[174] *See CAFTA-DR Investor-State Arbitrations*, U.S. DEP'T OF STATE, http://www.state.gov/s/l/c33165.htm (last visited Feb. 19, 2016).

[175] *See generally* PUBLIC CITIZEN, *supra* note 50.

The TPP's expropriation provision incorporates many of CAFTA-DR's refinements to NAFTA's provision, which states:

> No Party shall expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation (expropriation), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate and effective compensation in accordance with paragraphs 2, 3 and 4; and (d) in accordance with due process of law.[176]

Like CAFTA-DR, TPP provides that the expropriation provision is to be interpreted in accordance with an annex that is much more detailed than the provision itself.[177] The text of the TPP's proposed Annex 9-B matches CAFTA-DR's Annex 10-C rather closely. In outlining how a tribunal is to analyze if an indirect expropriation has occurred, CAFTA-DR and TPP use identical language:

> The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors: (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action.[178]

The only distinction between CAFTA-DR and TPP in the above quoted section is that TPP adds guidance on how a tribunal should analyze the question of whether "the government action interferes

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[176] *TPP* expropriation provision cite; TPP, *supra* note 21, at art. 9.8(1).

[177] *See TPP*, *supra* note 21, at Annex 9-B.

[178] CAFTA-DR, *supra* note 45, at Annex 10-C(4)(a); TPP Annex 9-B(3)(a) is identical except for the addition of a footnote.

with distinct, reasonable investment-backed expectations" by providing that "whether an investor's investment-backed expectations are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector."[179] By providing that the reasonableness of the investor's investment backed-expectations hinges on the extent of the government's regulation in the area and the *potential* for government regulation, TPP codifies one of the most important aspects of the Methanex tribunal's approach. Furthermore, TPP goes beyond Methanex by specifying that only "binding **written** assurances" are to be considered.[180]

Section III – Potential Conflict Between Environmental Provisions and Investor Provisions

By departing from the approach taken by other post-2007 U.S. FTAs, the TPP potentially provides broader environmental protections than earlier agreements. Rather than applying to a defined list of seven MEAs, TPP's MEA enforcement provisions seemingly apply more broadly to any MEA. One important example is the Paris Climate Agreement, although it should be noted that the Paris Agreement could not have been included in any earlier FTA because it did not exist yet.[181] Though TPP does not define the term "multilateral environmental agreement,"[182] it appears very likely that the Paris Climate Agreement can be considered an MEA.[183] Thus, any

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[179] *TPP*, *supra* note 21, at Ch. 9 n.36.

[180] *Id* (emphasis added).

[181] *See generally* Paris Agreement, *UNFCCC*, UNITED NATIONS INFORMATION PORTAL ON MULTILATERAL ENVIRONMENTAL AGREEMENTS, http://www.informea.org/treaties/unfccc/protocols (last visited Sept. 27, 2016).

[182] "Multilateral environmental agreements constitute an important part of the global environmental management framework. They are designed to coordinate policy action to tackle global and transboundary environmental problems cooperatively." Annick Emmenegger Brunner, *Conflicts Between International Trade and Multilateral Environmental Agreements*, 4 ANN. SURV. INT'L & COMP. L. 74, 76 (1997).

[183] The United Nations Framework Convention on Climate Change ("UNFCC") is clearly considered an MEA. The American Law Institute, *Multilateral Environmental Agreements,* SL098 ALI-ABA 1, 17 (2006) (listing the UNFCC as a "Major Multilateral Environmental Treaties" to which the U.S. is a party.); *see also* Richard Skeen, *Will the WTO Turn Green? The Implications of*

laws and regulations implementing TPP Parties' obligations under the Paris Agreement are protected by TPP in the manner discussed in Section I-B, above.

Parties to the Paris Agreement submitted their own GHG emissions reduction targets, and, in varying degrees of detail, explained how they planned to reach those targets.[184] The U.S. set a target of reducing GHG emissions "by 26-28% below its 2005 level in 2025 and to make best efforts to reduce its emissions by 28%."[185] The U.S. has explained that various laws, "as well as existing and proposed regulations thereunder, are relevant to the implementation of the U.S. target, including the Clean Air Act (42 U.S.C. §7401 et seq.), the Energy Policy Act (42 U.S.C. §13201 et seq.), and the Energy Independence and Security Act (42 U.S.C. § 17001 et seq.)."[186] Of these, the Clean Air Act is arguably the most important for reaching GHG emissions reduction targets, and specifically the Clean Power Plan ("CPP") regulation promulgated pursuant to Clean Air Act authority.[187] That is due to the fact that the CPP is the "EPA's first attempt to regulate carbon dioxide emissions from existing power plants, the largest source of carbon emissions in the United States."[188]

Injecting Environmental Issues into the Multilateral Trading System, 17 GEO. INT'L ENVTL. L. REV. 161, 177 (2004) ("The WTO, UNEP, and MEAs collaborated to produce a background document that outlined the compliance and dispute resolution provisions in each of the following MEAs: the UNFCCC; the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) . . . ."). Additionally, the United Nations Information Portal on Multilateral Environmental Agreements lists the Paris Agreement as one of two protocols of the UNFCC; the other protocol being the Kyoto Protocol. *UNFCCC*, UNITED NATIONS INFORMATION PORTAL ON MULTILATERAL ENVIRONMENTAL AGREEMENTS, http://www.informea.org/treaties/unfccc/protocols (last visited Feb. 19, 2016).

184 *See generally* Paris Agreement, *supra* note 181.

185 U.S. Cover Note INDC and Accompanying Information, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://www4.unfccc.int/submissions/INDC/Published%20Documents/United%20States%20of%20America/1/U.S.%20Cover%20Note%20INDC%20and%20Accompanying%20Information.pdf (last visited Feb. 19, 2016).

186 *Id.*

187 Rachel Stevens, *Will the Dark Cloud Over EPA's Clean Power Plan Rain on Paris?*, VERMONT LAW SCHOOL COP21/CMP11 OBSERVER DELEGATION BLOG (Nov. 11, 2015), http://vlscop.vermontlaw.edu/2015/11/11/will-the-dark-cloud-over-epas-clean-power-plan-rain-on-paris/.

188 *Id.*

Recall that the U.S. target is a 28% reduction in emissions from 2005 levels by 2025; the CPP "sets achievable standards to reduce carbon dioxide emissions by 32% from 2005 levels by 2030."[189] The CPP is a complex regulation that divides responsibility for reducing GHG emissions between the Federal and State governments. The Federal government, through the Environmental Protection Agency ("EPA"), is assigned the task of setting GHG emissions standards for affected power plants –referred to as electricity generating units ("EGUs"); EPA has set standards for every state other than Vermont, Alaska, and Hawaii.[190] The States are then left with the task of determining how to achieve their individual targets, and are given wide latitude in designing their GHG reduction approaches. The EPA rule provides three categories of emissions reduction measures that States can choose amongst, referred to as building blocks:

> Building Block 1 - reducing the carbon intensity of electricity generation by improving the heat rate of existing coal-fired power plants.
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> Building Block 2 - substituting increased electricity generation from lower-emitting existing natural gas plants for reduced generation from higher-emitting coal-fired power plants.
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> Building Block 3 - substituting increased electricity generation from new zero-emitting renewable energy

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[189] Climate Change and President Obama's Action Plan, THE WHITE HOUSE, https://www.whitehouse.gov/the-press-office/2015/08/03/fact-sheet-president-obama-announce-historic-carbon-pollution-standards (last visited Feb. 19, 2016).

[190] JONATHAN L. RAMSEUR AND JAMES E. MCCARTHY, CONG. RESEARCH SERV., R 44145, EPA'S CLEAN POWER PLAN: HIGHLIGHTS OF THE FINAL RULE 4, 11 (2015), *available at* https://www.fas.org/sgp/crs/misc/R44145.pdf ("a major change in EPA's final rule is EPA's establishment of uniform national CO2 emission performance rates for each of the two subcategories of electricity generating units— fossil-fuel-fired electric steam generating units (whether coal, oil, or natural gas) and stationary combustion turbines (natural gas combined cycle)—affected by the rule. These standards are the underpinnings for the state-specific emission rate and mass-based targets.").

> sources (like wind and solar) for reduced generation from existing coal-fired power plants.[191]

The CPP has faced heavy opposition from States and industry.[192] Dozens of States initiated suit to block the CPP shortly after the regulation was issued,[193] and in an unprecedented five to four decision, the Supreme Court stayed the implementation of the CPP pending review.[194] Because of the importance of the regulation and the intense opposition it has faced, an analysis of a theoretical TPP investor challenge to the CPP can shed light on the interaction of TPP's investor provisions and its environmental provisions, and can serve as a comparison between TPP and earlier FTAs. There is a significant amount of foreign direct investment in the U.S. mining and electrical generation industries. As of 2013, a total of $150 billion of foreign investment was in the mining industry, and a further $63 billion of foreign investment was in the electric power generation,

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[191] *FACT SHEET: Overview of the Clean Power Plan*, EPA, http://www.epa.gov/cleanpowerplan/fact-sheet-overview-clean-power-plan (last visited Feb. 19, 2016).

[192] Megan Herzog, *Clean Power Plan Litigation Kick-Off*, LEGAL PLANET (Oct. 28, 2015), http://legal-planet.org/2015/10/28/clean-power-plan-litigation-kick-off/. ("[T]he flood of petitions was unprecedented for an environmental regulation. E&E News confirms [paywall] that it took less than twelve hours for the Clean Power Plan to become the most heavily litigated environmental regulation of all time.").

[193] *Id.* ("West Virginia filed a petition for review of the Clean Power Plan together with 23 other states: Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, New Jersey, North Carolina, Ohio, South Carolina, South Dakota, Texas, Utah, Wisconsin, and Wyoming. State petitioners argue that 'the final rule is in excess of the agency's statutory authority, goes beyond the bounds set by the United States Constitution, and otherwise is arbitrary, capricious, an abuse of discretion and not in accordance with law.'").

[194] Robinson Meyer, *Will a Reconfigured Supreme Court Help Obama's Clean-Power Plan survive?*, THE ATLANTIC (Feb. 14 2016), http://www.theatlantic.com/politics/archive/2016/02/antonin-scalia-clean-power-plan-obama-climate-change/462807/. ("[T]he Supreme Court ruled 5-4 that the [Clean Power Plan] should neither be implemented nor enforced until the high court itself heard their opponents' case. This was itself unprecedented: Never before had the Supreme Court stayed a set of regulations before a federal court even heard the initial case about them.").

transmission, and distribution industry.[195] Given the percentage of the world's economy covered by TPP it seems likely that TPP member investors will be impacted by the implementation of CPP.

It has already been determined that CPP likely constitutes an "environmental law" for the purposes of TPP's environmental provisions, and thus to some extent, enforcement of CPP is mandated by TPP.[196] Assuming that there is a suitable investor to bring the claim, the owner of a coal-fired power plant might have several viable claims, depending on the GHG reduction approach taken by the State in which the plant is situated.

If the State chooses to meet its target by requiring efficiency improvements in coal-fired plants, such as by mandating carbon capture and sequestration technology, an investor might make a claim that the cost of compliance is so high that in effect the investment in the coal-fired power plant has been expropriated. Such a claim would be very similar to that made by the investor in Glamis Gold. The basis of the expropriation claim in Glamis was that the new environmental remediation measures adopted by California had raised the cost of the Glamis project as to make it uneconomical. The tribunal disposed of the expropriation claim by determining that the investor's investment had not been sufficiently devalued to constitute an expropriation. The costs of modifying an existing coal plant to meet the stringent GHG emission standard established by the CPP might very well be significant enough, however, to cause a tribunal to find that an expropriation has occurred. In 2010, "the U.S. Department of Energy and the National Energy Technology Laboratory estimated that '[carbon capture and sequestration] technologies would add around 80% to the cost of electricity for a new pulverized

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[195] Organization for International Investment, *Foreign Direct Investment in the United States 2014 Report,* http://www.ofii.org/sites/default/files/FDIUS2014.pdf.

[196] CPP's standing as an "environmental law" can be established through two separate mechanisms. As already discussed, CPP can be considered an "environmental law" because it implements the U.S.'s obligations under the Paris Climate Agreement. CPP can also be considered an "environmental law" because its "primary purpose . . . is the protection of the environment, or the prevention of a danger to human life or health . . . ." *TPP*, *supra* note 21, at art. 20.1.

coal plant, and around 35% to the cost of electricity for a new advanced gasification-based plant.'"[197] Although such claims do not appear to have been brought against other EPA regulations, there is some indication that the EPA has at times been concerned by the possibility of one of their regulations triggering an expropriation challenge.[198] Considering the pushback that CPP has received from States and Industry, as well as the cost of some potential compliance measures, CPP could conceivably face such a challenge.

Substituting higher carbon emitting energy production for lower emission generation, such as by substituting coal EGUs with natural gas EGUs or renewable energy production, is explicitly envisioned by the CPP as one method for a State to reduce its carbon emissions. If the State chooses to meet its target by increasing the use of natural gas or renewable energy generation at the expense of coal, a coal investor might bring a claim alleging that its market share has been expropriated, or that it has been denied access to the market. This type of claim would closely mirror the claims in both S.D. Myers and Pope & Talbot. Although both those claims were ultimately unsuccessful, as was discussed above, the tribunals in each case found that denial of access and market share were potentially viable claims. As with Glamis Gold, the Pope & Talbot tribunal found that the regulation at issue could have constituted an expropriation, if only its economic impact on the investor had been larger.

If a tribunal to find in the investor's favor in either case, then the continued enforcement of CPP would be greatly jeopardized. Whether or not the U.S. would continue to enforce CPP would likely depend on the number of investors in a position to bring similar claims. While such claims might well have had some teeth under NAFTA, it appears unlikely that they would pose much of a threat to regulators under TPP, because TPP's expropriation section con-

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[197] Carbon Capture Use and Storage, CENTER FOR CLIMATE AND ENERGY SOLUTIONS, http://www.c2es.org/technology/factsheet/CCS.

[198] *See* Gus Van Harten, *Guatemala's Peace Accords in A Free Trade Area of the Americas*, 3 Yale Hum. Rts. & Dev. L.J. 113, 139–40 (2000) ("According to the Office of the U.S. Trade Representative, for example, the U.S. Environmental Protection Agency 'is playing a larger role than might previously have been the case' in U.S. preparations for FTAA negotiations 'because of the agency's concern over an individual government's right to issue regulations without crossing over into an expropriation dispute.'").

tains strong language limiting the discretion of tribunals. Specifically, TPP's Annex 9-B specifies that "[n]on-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations, except in rare circumstances."[199] The CPP fits easily within this language. The CPP is aimed directly at reducing GHG emissions for the purposes of reducing the catastrophic effects of climate change on both humans and the environment in general. While it is possible that a tribunal could find that CPP would constitute a "rare circumstance," this seems unlikely. Furthermore, TPP's provisions require that one of the components of the tribunal's analysis must be "the extent to which the government action interferes with distinct, reasonable investment-backed expectations," and includes among the factors for determining reasonableness "the nature and extent of governmental regulation or the potential for government regulation in the relevant sector."[200] The U.S. has heavily regulated the coal industry, and all EGUs, for years. These regulations have covered everything from the mining of the coal itself, to the type of coal an EGU uses, to the amount of mercury an EGU can emit. Furthermore, governments world-wide have been moving towards strict regulation of GHG emissions for some time. Thus, investors cannot claim that they are surprised that GHG emitting industries are now starting to be regulated.

CONCLUSION

Only time will tell what overall effect TPP will have on the environment. While there is some potential for TPP's investor provisions to negate the benefits of its environmental provisions, many challenges to a Party's environmental regulation will likely be foreclosed by TPP's more limited expropriation section. From a procedural perspective, TPP may lack an important mechanism for enforcing critical MEAs, but this difference between TPP and earlier FTAs is, in fact, smaller than it first seems because by defining environmental laws to include laws implementing a MEA, TPP's environmental provisions incorporate any MEA rather than only the

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199 Cite Annex 9-B quote TPP; *TPP*, *supra* note 21, at Annex 9-B.

200 Cite TPP footnote; *TPP*, *supra* note 21, at Ch. 9 n.36.

seven included in earlier FTAs. Moreover, TPP would likely create one significant environmental benefit; by superseding NAFTA as the operative FTA between Canada, Mexico, and the U.S., TPP would replace NAFTA's overly vague expropriation and compensation provision with a new provision that is less likely to interfere with governmental attempts to reduce GHG emissions. It remains to be seen whether this environmentally positive aspect of TPP can outweigh the negative environmental consequences of expanding free trade and, with it, investor protections to new countries.